The territorial constitution and the Brexit process

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Stephen Tierney*

Abstract: This article assesses the United Kingdom's rapidly evolving territorial constitution through the register of federal theory. While not arguing that the UK is federal or ought to be described as federal, the article contends that federalism is a useful prism through to assess how well the UK's constitution accommodates autonomy on the one hand and the efficacy of union, which is the essential complement of pluralism, on the other. It then proceeds to assess the Brexit process in light of existing imbalances in the UK's territorial arrangements. The way in which Parliament has paved the way for the United Kingdom's withdrawal from the EU is widely considered to be deeply unpropitious for devolution. However, upon further analysis of the legal changes and internal political commitments that have been designed to facilitate Brexit, it would appear that a more balanced set of constitutional arrangements may be emerging which could in fact bolster and further embed the United Kingdom's territorial constitutional commitments.

Key words: Brexit, devolution, federalism, territorial constitution

1. *Introduction*

The referendum vote in 2016 to leave the European Union came at a time of rapid transformation in the United Kingdom's territorial constitution. Last year marked the 20th anniversary of the legislation through which Parliament created bespoke and complex systems of self-government for each of Scotland, Wales and Northern Ireland, the last of these of course the culmination of a fraught peace process. This was a dramatic and in some ways overwhelming period of constitutional change. In addition to establishing devolution, Parliament also passed the Human Rights Act 1998, the House of Lords Act 1999, and the Freedom of Information Act 2000, while steps began to restructure and rename the Appellate Committee of the House of Lords. But even in relation only to the territorial constitution, the period was one of great complexity. A number of reform processes took place concurrently, each with different origins and each resulting in highly singular models of territorial government. Indeed, the word 'asymmetry'[1] entered our constitutional lexicon as a key descriptor of Britain's new territorial arrangements.

Were it not for the Brexit process which now so preoccupies both our institutions of government and those who comment upon them, the law and politics review journals and blogs would probably be dominated by reflections upon this anniversary and by further comment throughout this year to mark the anniversaries of the creation of the legislative assemblies and parliaments in Belfast, Cardiff and Edinburgh. But of course the Brexit vote and the political manoeuvrings that it has produced have over-shadowed other areas of the British constitution for which it promises to have profound implications.

In this article we will first take stock of this period of extraordinary and ongoing constitutional change brought about by devolution, arguing that for all its benefits in terms of granting autonomy to Scotland, Wales and Northern Ireland, the trajectory of devolution and the pace of transformation since then are together potentially destabilising to the union.

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[1] CMG Himsworth, 'Devolution and its Jurisdictional Asymmetries' (2007) 70 MLR 31.

Secondly, we will observe that despite wide recognition of this problem, federalism has very rarely been taken seriously as a solution to the lop-sidedness produced by devolution which leaves England with no form of specific national self-government. Part of the reason for this is that federalism itself generally fails to be addressed as a potentially capacious constitutional idea but is instead tied to particular institutional understandings of what a federal system must look like. We will argue that when its underlying purpose is reconsidered from the perspective of constitutional theory, the institutional adaptability of federalism in fact makes it of wider relevance to a range of territorial arrangements, as these vary from state to state. While not arguing that the UK is federal or ought to be described as federal, our claim is that federalism offers a framework for constitutional government that is more commodious, and therefore potentially responsive to the territorial realities of each polity, than is often assumed; and that its core idea is a useful mirror with which to reflect on the health of the UK's constitutional arrangements. Thirdly, we then discuss how, even with this broader conception of federalism, the UK's territorial constitution requires to develop a much healthier balance between the competing but also complementary goals of pluralism and union.

In the final part of the article we turn to the Brexit process wherein we can see the consequence of this imbalance in full relief. Such has been the drama of the past three years that it is of course impossible to make predictions about where relations between the UK and EU will culminate. Therefore, the reflections offered here will instead draw upon the main steps in the process to date which, regardless of what happens next, have already cast light on the state of the territorial constitution. In some ways this period seems to be deeply unpropitious for devolution. We will discuss why that is the case, noting how intergovernmental tensions over the withdrawal process have exposed deeper strains within the territorial constitution itself. But we will also argue that, perhaps paradoxically, it is in thinking about and preparing for Brexit, and in the interaction of Brexit legislation and recent devolution statutes, that we may be witnessing the emergence of the more balanced set of constitutional arrangements that is in fact needed if the UK's territorial constitution is to continue to flourish.

2. *Twenty Years of Devolution*

Given the level of asymmetry and complexity that characterise the three very different models of government created two decades ago, the arrangements that were put in place are to some extent still finding their feet. A common description of the three statutes passed in 1998 – the Scotland Act, Northern Ireland Act and Government of Wales Act - is 'devolution settlements', but the territorial constitution is far from 'settled'.[2] Indeed, the Northern Ireland Act was specifically designed to avoid the idea of constitutional finality, section 1 leaving open to Irish nationalists the prospect of a referendum on reunification of Ireland.[3] The notion of finality is equally misplaced in relation to the other two devolved systems, a fact evident from the way in which the competences devolved to both Scotland and Wales, and indeed the entire structure of devolved government for Wales, have been the subject of radical change, particularly in the past decade, with Scotland Acts passed in 2012 and 2016 and three statutes for Wales between

[2] N Walker, 'Our Constitutional Unsettlement' [2014] Public Law 529.

[3] Northern Ireland Act 1998, section 1 and schedule 1. It should also be noted that, of the three sets of devolved arrangements for the UK, those in Northern Ireland have travelled along a particularly rocky road and remain suspended since January 2017.

2006 and 2017,[4] not to mention the current deliberations of the Commission on Justice in Wales, which may well propose a new legal jurisdiction for Wales.[5]

Following on from the Scotland Act 2012, and without the tax-varying powers which it contained having even taken effect, we had the drama of the independence referendum in 2014 and, hot on its tail, the Scotland Act 2016, making Scotland one of the most autonomous sub-state territories in Europe. One consequence of asymmetry in the UK's devolution arrangements has been some degree of curtain-twitching. Welsh (and indeed English) nationalists have, since 1998, looked northwards with envy at the degree of autonomy enjoyed by the Scottish Parliament. The upshot has been a process of seemingly endless devolution of powers to Wales, with Parliament barely pausing for breath from one inquiry to another, resulting in a complex legislative mosaic, culminating in the Wales Act 2017. This last piece of legislation indeed represents a gear shift towards a more fully autonomous model in line with the Scotland Acts.[6]

Just as there has been no settlement, nor is there any obvious finishing post for devolution so long as it remains largely demand-led. Initiatives for further devolution have tended to come from the sub-state territories themselves and have been acceded to by the centre, either due to a lack of strong opposition (in relation to Wales), or in order to deal with the perceived danger of strengthening nationalism (the impetus behind the Scotland Acts of 2012 and 2016). The consequence has been a rapidly evolving process of further autonomy for the devolved territories with no meaningful consideration of the impact of these changes upon the UK as a state.[7] It is in this context of rapid change that the House of Lords Constitution Committee has undertaken a number of inquiries which have attempted to track the impact of more and more devolution legislation.[8] What is notable is that parliamentary scrutiny of major devolution proposals has tended to take place *ex post facto*; either after the passage of important legislation, or at least after the giving of political commitments which are very difficult to roll back at the point Parliament becomes involved. Furthermore, since Parliament is expected to respond piece by piece to disjointed proposals, it is very challenging to situate these in the broader context of the union, or of the deep dissatisfaction within England with processes which take little if any account for the fact that England was not granted devolution at all,[9] apart from some innovations in mayoral and local government.[10]

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[4] Government of Wales Acts 2006 and 2014; Wales Act 2017.

[5] See <https://beta.gov.wales/commission-justice-wales> accessed 1 July 2019.

[6] The 2017 Act constitutes no less than a transformation of Welsh devolution, moving it from a conferred matters model to a reserved matters model, the latter analogous to Scottish devolution which is widely seen as a very strong model of self-rule.

[7] For an insightful set of reflections on the state of the union see R Rawlings, 'Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis' (2015) 42 Journal of Law and Society 471.

[8] House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (HL 2014–15, 145) (hereafter 'Proposals for the Devolution of Further Powers to Scotland Report'); House of Lords Constitution Committee, *Inter-governmental relations in the United Kingdom* (HL 2014–15, 146) (hereafter 'Inter-governmental relations in the United Kingdom Report'); House of Lords Constitution Committee, *Scotland Bill* (HL 2015–16, 59) (hereafter 'Scotland Bill Report'); and House of Lords Constitution Committee, 'The Union and devolution', (HL 2015-16, 149) (hereafter The Union and devolution' report).

[9] S Tierney, 'Brexit and the English question' in F Fabbrini (ed), *The Law and Politics of Brexit* (OUP 2017) 95-114.

[10] Greater London Authority Act 1999; Cities and Local Government Devolution Act 2016.

In 2014 the Constitution Committee reported on proposals for further powers for the Scottish Parliament,[11] which were initially formulated (effectively on the back of an envelope) a few days before the independence referendum,[12] and which, through the Smith Commission[13] rapidly took on pre-legislative form. The Committee expressed concern that the UK Government had simply transformed the Smith Commission proposals into draft legislation without addressing their implications for the United Kingdom as a whole.[14] The Committee's conclusion was that the Government must 'devise and articulate a coherent vision for the shape and structure of the United Kingdom, without which there cannot be constitutional stability.'[15] Over four years later it is very hard to detect any such coherent vision in any of the proposals to extend devolution which were advanced either before or since 2014, although any such endeavour has to a large extent been overtaken by the more pressing issue of Brexit.

The 2014 experience prompted a full inquiry by the Committee, resulting in a more comprehensive report 'The Union and devolution', published in May 2015. Again the Committee set out its concerns, this time in greater detail and with an even stronger expression, calling for steps to 'safeguard the integrity of the Union.'[16] And in this level of concern the Committee is not alone. Other parliamentary committees have made similar points about the union,[17] as have significant reports by both the Institute for Government[18] and the Bingham Centre for the Rule of Law.[19]

The United Kingdom's 'political constitution' is one which has been able to bring about constitutional change rapidly and flexibly. In many ways this has been a strength, allowing it

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[11] 'Proposals for the Devolution of Further Powers to Scotland Report' (n 8).

[12] David Cameron, Gordon Brown and Nick Clegg, 'The Vow', 16 September 2014.

[13] 'Report of the Smith Commission for further devolution of powers to the Scottish Parliament' (27 November 2014) <https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf> accessed 1 July 2019.

[14] 'Proposals for the Devolution of Further Powers to Scotland Report' (n 8) para 13.

[15] 'Proposals for the Devolution of Further Powers to Scotland Report' (n 8) para 24. In its subsequent report on intergovernmental relations, the Committee also stated: 'The UK's devolution settlements are of the highest constitutional significance. We are deeply concerned by the lack of central co-ordination and oversight of the devolution settlements and of the minimal consideration given to the effect of devolution in one area of the UK on other areas, and on the Union as a whole.' 'Inter-governmental relations in the United Kingdom Report' (n 8) para 133.

[16] It asserted: 'Proper consideration of the cumulative impact of devolution on the integrity of the Union itself has been lacking… power has been devolved without any counter-balancing steps to protect the Union… While the constitution should reflect the wishes and interests of the nations and regions, that must not be at the expense of the stability, coherence and viability of the Union as a whole. Should any proposals for further devolution arise in the future, they should be considered within an appropriate framework of constitutional principles that safeguard the integrity of the Union.' 'The Union and Devolution Report' (n 8) Summary.

[17] E.g. House of Commons Public Administration and Constitutional Affairs Committee, *The Future of the Union, part one: English Votes for English laws* (HC 2015–16, 523) para 13.

[18] Institute for Government, 'Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU' (Institute for Government Briefing Paper, October 2016) <https://www.instituteforgovernment.org.uk/summary-devolution-after-brexit> accessed 1 July 2019.

[19] 'We can no longer allow the basic structure of the country to evolve in a haphazard fashion, through deals behind closed doors and unenforceable promises blown by the prevailing political wind in one part of the country or another.' Bingham Centre for the Rule of Law, 'A Constitutional Crossroads: Ways Forward For the United Kingdom' (British Institute of International and Comparative Law, 15 May 2015) <https://www.biicl.org/documents/595_a_constitutional_crossroads.pdf?showdocument=1> accessed 1 July 2019, 19. See also S Tierney, 'Can the Union Survive the Election?' (*UK Const L Blog*, 9th May 2015) (available at http://ukconstitutionallaw.org).

to respond with agility to constitutional pressures. In another sense though it can fall victim to the vicissitudes of political demands, giving these constitutional effect too rapidly without thought to the impact of fast and significant changes in one area upon the broader constitutional landscape. Devolution is a classic case in point. By broad consensus, as we take stock on the 20th anniversary of devolution, we see an *ad hoc* approach to territorial government, one that has largely acquiesced in accommodating ambitious and highly specific autonomy demands from Scotland and Wales, but which in doing so has come to be characterised by a lack of reflection about the impact of these changes upon the coherence of the union or of the purposes or principles which underpin it.

3. *The United Kingdom and the Federal Idea*

The neglect of the UK as a union is clear, as is the disregard for English identity, evident in the fact that England has been given no form of national devolved government at all.[20] In this context it is perhaps surprising that federalism has rarely featured among constitutional prescriptions for the UK. Dicey famously said that in a federal system people 'must desire union, and must not desire unity.'[21] On the face of it, this largely sums up the approach taken by the Constitution Committee. Dicey's phrase seems to capture the fact that while the UK requires an underlying commitment to, and focus upon, what the union needs to thrive, this is entirely compatible with devolution itself. Union does not mean centralisation; territorial autonomy can be fostered within a coherent state project.

But despite some attention being accorded to it at the turn of the 20th century,[22] it is of course the case that federalism has rarely been a point of reference either in attempts to describe the nature of the British union, or in reflections about how it ought to evolve constitutionally.[23] Indeed, some argue that there is an in-built hostility towards federalism within the British political psyche.[24] David Marquand in fact has described the British aversion to federalism as 'neurotic', concluding that 'misconceptions and myths blind British political elites to its potential benefits'.[25]

Despite Dicey's pithy expression concerning union and unity, he is in fact part of the reason for this neurosis, although only as a contributor to a wider disciplinary tradition that has served to constrain the federal idea within narrow institutional confines. The late Michael

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[20] In fact, we can talk about 'double asymmetry' in devolution. Not only are there stark differences in the powers devolved to Scotland, Wales and Northern Ireland but of course England, the largest nation in the Union, was left out of the devolution project. S Tierney, 'Federalism in a Unitary State: A Paradox too Far?' (2009) Regional and Federal Studies 237.

[21] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1915) 75.

[22] See A Jackson, 'The Failure of British and Irish Federalism, circa 1800–1950' in R Schütze and S Tierney (eds), *The United Kingdom and the Federal Idea* (Hart 2018) 29-47.

[23] For a recent revival of interest see D Melding, *The Reformed Union: The UK as a Federation* (Institute of Welsh Affairs 2013); D Torrance, *Britain Rebooted: Scotland in a Federal Union* (Luath Press 2014); and Schütze and Tierney (n 22).

[24] M Burgess, *The British Tradition of Federalism* (Leicester University Press 1985). See also, A Gamble, 'The Constitutional Revolution in the United Kingdom' (2006) 36 Publius 19; and M Flinders, 'Constitutional Anomie' (2010) 44 Government and Opposition 383.

[25] D Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77 Political Quarterly 175.

Burgess was scathing of what he took to be Dicey's misreading of federalism. For Burgess, Dicey

> 'established a narrow legalistic conception of federalism that was handed down from one generation to the next in supine fashion … In practical terms it effectively excluded an important option for British constitutional reform up until quite recently and it continues to hinder clarity of thought about British national interests… It is hardly surprising therefore that misunderstanding and confusion – not to mention barely concealed hostility – about federalism produced the phobia that has been a characteristic hallmark of British political culture.'[26]

Although Dicey has been accused of distorting our understanding of the fundamental nature of the constitution,[27] in relation specifically to federalism Burgess tends to flatter, and in so doing deflect, in the very act of criticism. In fact, Dicey was not particularly interested in federalism as a subject of intellectual study. It was just one possible solution to the crisis in the Anglo-Irish union which so preoccupied him, and in the end he rejected it as a slippery slope to Irish disunion.[28] Insofar as he attempted to define federalism, Dicey was no innovator, adopting certain tropes within an already burgeoning literature, and, no surprise, helping to consolidate, as Burgess suggests, a narrow formalism in the ontology of federalism as he did in relation to a number of constitutional concepts.

But Dicey's approach merely affirms a much broader and inter-temporal tradition. In a literature dominated by political science and doctrinal constitutional law, attempts to define federalism tend to derive from description, drawn out from observing particular sets of institutional arrangements - which have been called 'federal' - over the past two hundred and fifty years, with a particularly strong influence being exerted by the American model. What we find in the literature is either a generic institutionalism, as in Kenneth Wheare's two levels of independent government,[29] or a very elaborate and detailed institutional plan of what a federal political system must look like, such as that set out by Ronald Watts, with specifics regarding second chambers and full judicial review.[30] The result either way has been a didactic and binary approach to federalism that focuses exclusively upon its institutional manifestation: if a system reflects the model which the author has it mind it is federal, if it does not, it is not. And for so many commentators the UK falls on the wrong side of the line. However, this approach does not take us far; with description masquerading as definition, the attempt to define federalism is a largely circular process and depends entirely upon where one draws the institutional line.

Another approach within federal scholarship is no more helpful, focusing as it does on the merits or demerits of federalism. Those who write on federalism, and leaving aside the few

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[26] M Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006) 21.

[27] M Loughlin and S Tierney, 'The Shibboleth of Sovereignty' (2018) MLR 989.

[28] See J Kendle, *Ireland and the Federal solution: the Debate over the United Kingdom Constitution, 1870–1921* (McGill-Queen's University Press 1989) 55.

[29] 'The test which I apply for federal government is simply this: Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them?' K Wheare, *Federal Government* (4th edn, OUP 1964) 62.

[30] RL Watts, 'Federalism, Federal Political Systems, and Federations' (1998) 1 Annual Review of Political Science 117; R Watts, *Comparing Federal Systems* (2nd edn, Queen's University Press 1999).

sceptics like Dicey or Carl Schmitt,[31] are often also be passionate crusaders. Unlike the narrow formalists, the most fervent do not focus so much upon institutional description. Such is their enthusiasm that they tend to gloss over the *a priori* issue of defining the subject, preferring to extol its virtues; their accounts, as Alvin Jackson puts it, owing more to earnest evangelism than rigorous theology.[32]

It is important to avoid both of these approaches, and instead to define and analyse federalism firmly within constitutional theory. Such an approach seeks to draw out the specific constitutional purposes of federalism as a distinct order of rule for the modern state. Constitutionalism is an instrumental device with one generic, comprehensive purpose: the management of political power within a polity. To give effect to this purpose a constitution creates a set of rules and a body of institutions to operate these rules; in doing so it transforms political power into authority, thereby endowing that power with lawful legitimacy. This is the way in which the underpinning rationale of all modern constitutions manifests itself in normative practice.[33] Federalism is a discrete genus of modern constitutionalism. As part of the modern constitutional project it shares the common purpose of modern constitutionalism: to transform political power into authority. But as a distinct type of modern constitution it does this in pursuit of specific constitutional ends: federalism as a particular project of modern constitutional rule manages political power for a particular purpose: what is that purpose?

The author is engaged in a wider project that seeks to define federal constitutionalism as a specific order of rule for the modern state. There is not space here to explain this project in detail, but it contends that the specific constitutional (as opposed to political) purpose of federalism is the accommodation of territorial pluralism through the constitutional recognition and reconciliation of different levels of government within a state. A key point in an approach grounded in constitutional theory is that the constitution, in pursuit of its core constitutional purpose, cannot be generated through an abstract model but must respond to the specific societal conditions it is designed to serve. Any federal constitution must accommodate territorial pluralism as it manifests itself within the state in question. It is in this way that the federal idea can be useful in addressing the UK's highly particular form of territorial pluralism, even if the term 'federal' is not itself used by the constitution's key actors. The very concept, given its core constitutional purpose, can nonetheless serve as a benchmark for how the constitution adapts in its own particular way to accommodate the specific form of territorial pluralism that characterises our union state (or state of unions).[34]

What flows from federalism's core purpose, regardless of its institutional manifestation, is that the very idea of federalism requires a balance between pluralism facilitated through autonomy on the one hand and a concern for the coherence of the state project itself, encapsulated in the idea of union, on the other. While the former is achieved through what Daniel Elazar called self-rule,[35] what we cast more tightly as 'autonomous

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[31] C Schmitt, *Constitutional Theory* (trans Jeffrey Seitzer, Duke University Press 2008) 390. Schmitt concluded that a meaningful federal system was, in the end, incompatible with that of the modern state.

[32] Jackson, 'The Failure of British and Irish Federalism' (n 22) 30.

[33] M Loughlin, *The Foundations of Public Law* (OOUP 2010).

[34] The elegant expression offered by James Mitchell: J Mitchell, 'The Westminster Model and the State of Unions' (2010) 63 Parliamentary Affairs 85.

[35] DJ Elazar, *Exploring Federalism* (University of Alabama Press 1987).

government'; the commitment to the union can only be achieved through shared rule, or what, in recognition of the complex matrix of federal rule, we will call 'associative government'.

It is necessary to focus upon the latter dimension as much as the former, and, crucially, to understand them as collaborators rather than antagonists. The union dimension highlights how the pluralism or autonomy element of federalism should not descend into 'two solitudes'[36]: the autonomy of the state's territories on the one hand and the autonomy of the central institutions of rule on the other. The notion of union in fact involves the integration of those who enjoy autonomy in the central government of the state. Associative government therefore is not a constraint on autonomy, but rather a form of co-ownership in the constitution and in the government of the state as a whole. It also has the advantage of preventing the state itself from coming to be seen as an irrelevance within its autonomous parts.

To bring these points together, it is not necessary to struggle to compartmentalise the UK within an either/or box when it comes to federalism, or to launch into a passionate promotion of federalism as a moral good. Instead federalism as an idea is a useful benchmark for the insight it offers on how to help stabilise states characterised by deep territorial pluralism: balancing the two dimensions of this pluralism in an integrated way by demonstrating that a key dimension of autonomy for sub-state territories is associating in the government of the central state, while the health of the state project as a whole depends upon an understanding that the very purpose of federalism, as a form of constitutional rule, is the accommodation of territorial pluralism, and therefore that autonomy for its constituent territories is a logical extension of this underpinning purpose.

There is no doubt that the UK has gone a long way in terms of constitutional recognition of territorial autonomy. We see this not only in the devolution of extensive competences but also in the institutional scaffolding provided by sections 1 of the Scotland Act 2016 and Wales Act 2017 respectively. These affirm the permanence of the devolved institutions which are not to be abolished except following a referendum in the territory in question.[37] There is of course an argument that these provisions could be changed by Parliament, similar to that put forward by A B Keith in relation to an analogous self-denying ordnance in the Statute of Westminster,[38] but as constitutional theorists we do the discipline no favours if we attempt to amputate our subject from its intimate relationship with political reality. It is hard to see how the United Kingdom as the state we know today would survive unilateral efforts by the UK Parliament to abolish Scottish devolution.[39]

With self-rule constitutionally protected, at least for those parts of the Union which enjoy it, the main deficit from the perspective of what we might call the 'federal balance' is therefore the associative government dimension: the meaningful assimilation of the

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[36] H MacLennan, *Two Solitudes* (MacMillan 1978).

[37] Scotland Act 2017, s 1, inserting new s.63A into the Scotland Act 1998 and Wales Act 2017 s 1, inserting new Part A1 into the Government of Wales Act 2006.

[38] Statute of Westminster 1931, s 4. Keith argued: 'Under the statute no attempt is made to renounce the legislative supremacy of the United Kingdom Parliament…', AB Keith, *The Governments of the British Empire* (Macmillan 1936) 34-35.

[39] See Bingham Centre, 'A Constitutional Crossroads' (n 19) 13. At a deeper level it can be argued that devolution has now tempered the very meaning of constitutional sovereignty in the United Kingdom: Loughlin and Tierney, 'The Shibboleth of Sovereignty' (n 27) 1015-16.

territorialisation of the constitution within the institutions, principles and modus operandi of the central state. This leads us to the Brexit process.

4. *Brexit and Devolution*

At the time this article is submitted (August 2019), it is impossible to tell where Brexit is going in terms of both an agreed withdrawal agreement and any future relationship agreement between the UK and the EU. Therefore, our focus is not upon what might happen in the future but simply what the planning process for Brexit since 2016 already demonstrates about the territorial constitution.

At first glance, the prospects for a rebalancing of the state and the achievement of a healthier relationship between the autonomy and associative dimensions of territorial government do not look good, particularly as we reflect on developments over the past two years. But we will argue that, upon closer scrutiny, the picture is more mixed than it may at first appear, and that the political battles that have been fought over Brexit legislation, when set against the parallel constitutional changes brought about by the Scotland Act 2016 and Wales Act 2017, may well be leading to a more complex, consensual and possibly formalised dimension of associative government than would otherwise be the case.

A. *Devolution Denied?*

Let us begin however with the strong counter-argument which, to many, is more plausible: that the Brexit process has exposed the notion of a federal balance in the UK constitution to be a sham. There is merit in this claim for two main reasons. The first is that the devolved institutions have no veto power in relation to major constitutional change. The second is that they have no enforceable power of consent in relation to constitutionally significant legislation that flows from these processes of fundamental transformation; a fact exposed by both judicial pronouncement and parliamentary practice.

The first of these realities was demonstrated by the referendum of 2016 itself. When the national UK majority for Leave is broken down, there were of course majorities for Remain in Northern Ireland and Scotland.[40] The First Minister of Scotland put forward the view that such a major constitutional change should require the endorsement of the populations of each of the four territories of the UK.[41] This was given short shrift by the UK Government and didn't stimulate much political attention outside of Scotland. But from a federal perspective, constitutional amendment is one key area in which the strength of associative government manifests itself. In many federal systems important changes to the federal constitution can only be brought about by cross-territorial agreement. To take the most pertinent example, Australia, which uses referendums to amend its constitution, constitutional change in fact requires, in

[40] The referendum question was: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' Across the UK 52% voted Leave, but within Northern Ireland and Scotland only 44% and 38%, respectively, did so.

[41] 'SNP's Sturgeon says UK withdrawal from EU "must have" four nation backing' BBC News, 29 October 2014 <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-29805045> accessed 1 July 2019.

addition to parliamentary support, not only a flat national majority for the proposal to pass, but also majorities within four of its six territories in such a referendum.[42]

There has also been strong devolved objection to both the principle and the practice of the passage of significant legislation, where that legislation has important consequences for devolved competence, without the consent of the devolved legislatures. The lack of any meaningful principle here was exposed by the *Miller* case.[43] Although the Sewel convention, to the effect that the UK Parliament will not normally legislate in relation to devolved matters without the consent of the devolved legislature affected, had been given statutory recognition in the Scotland Act 2016,[44] and then in the Wales Act 2017,[45] this recognition falls short of legal authority.[46] Nick Barber argued in 2010 that Parliament was effectively constrained by these provisions:

> 'The Scottish Parliament has the power it has because of a statute of the United Kingdom Parliament, and, in law, the United Kingdom Parliament retains the capacity to remove these powers at any time. This narrow legal view obscures the constitutional reality of the Scottish Parliament's position. In a federation both the federal level (for our purposes, the Westminster Parliament) and the state level (Scotland) have their own area of power, conferred on them by the constitution, that the other level cannot encroach upon: all levels of the state are constitutionally limited. In many respects the United Kingdom now looks more like a federal than a unitary state.'[47]

For many, *Miller* showed this to be untrue. The Supreme Court took the view that the Sewel convention, even with statutory recognition, constituted no more than 'legislative recognition' of a 'political convention' which 'operates as a *political* restriction on the activity of the UK Parliament'.[48] The court could not treat the convention as a legal restriction, but nor did it even emphasise its status as a constitutional rule moderating behaviour but falling short of a law – the normative *via media* by which conventions are given salience within our uncodified constitution.[49]

Parliamentary practice has since borne out the weakness of the principle of devolved consent. The European Union (Notification of Withdrawal) Act 2017, which authorised the triggering of Article 50, was passed without the need for legislative consent, and despite

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[42] Commonwealth of Australia Constitution Act 1900, s 128.

[43] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[44] Scotland Act 2016, s 2, introducing new s 28(8) to the Scotland Act 1998.

[45] Wales Act 2017, s 2, introducing new s 107(6) to the Government of Wales Act 2006.

[46] These identical provisions are framed in terms of recognition not legalisation, eg Scotland Act 2016, s 2: 'But *it is recognised that* the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament', emphasis added,

[47] N Barber, 'Scottish Independence and the Role of the United Kingdom' (*UKCLA blog*, 11 Jan 2012) <https://ukconstitutionallaw.org/2012/01/11/nick-barber-scottish-independence-and-the-role-of-the-united-kingdom/> accessed 16 July 2019.

[48] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* (n 43) [145].

[49] The majority of the court in *Miller* (n 43) stated at [151] that the policing of the scope and the manner of operation of political convention 'does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.' This is undoubtedly true, but courts can recognise the existence and salience of conventions: eg *Attorney-General v Jonathan Cape Ltd and Others* [1976] QB 752; *Reference Re Resolution to amend the Constitution* [1981] 1 SCR (Canada) 753.

general acceptance that the Sewel convention applies to the Bill, the European Union (Withdrawal) Act was passed without the legislative consent of the Scottish Parliament.

These developments clearly call into question whether the UK constitution has in reality done anything to correct the autonomy/associative government imbalance. The Supreme Court's refusal to affirm the constitutional significance of the Sewel convention as a principle of associative rule within the constitution, and Parliament's preparedness to legislate in vital matters without devolved consent seems, from one perspective, to deny that there is such a principle at work within the constitution at all. However, there is also evidence that in other ways, and perhaps paradoxically, the Brexit process is demonstrating, and possibly even helping to bring about, a deeper and longer term consolidation of the shared rule dimension of devolution. Even in the passage of Brexit-related legislation, it is too easy to address only the issue of refusal of consent. There are three other issues to consider. One is the efforts made by the UK Government to secure that consent; another is the provisions in this legislation that anticipate the dimension of shared rule after Brexit; while a third is making and giving effect to new international agreements. We address these in the next sub-section of the article.

B. *Brexit and the Reality of Territorial Pluralism*

The passage of the European Union (Withdrawal) Act 2018 is instructive. Section 12 of the Act amends the main devolution statutes in order to regulate devolved competence in relation to retained EU law. When the Bill was published, clause 11, which became s.12, left to the discretion of the UK Government, through Orders in Council, the power to determine when and how to release areas of legislative competence to the devolved administrations. It was in effect a unilateral, albeit apparently temporary, restriction of the self-rule component of devolved authority. The context was the need for common frameworks for the UK after Brexit. What happened next is instructive and displays the political strength of the devolved administrations acting in concert. Due to the political opposition in Cardiff and Edinburgh to this provision, it was completely rewritten. The autonomous prerogatives of the devolved territories were largely maintained, supplemented with a complex plan to manage in a shared way the drafting of common frameworks in relation to returning EU competences. Before Orders in Council relating to common frameworks can be made, an elaborate process of consultation must be gone through, involving parliamentary accountability, with a focus upon the gaining of consent.[50] The final form of s.12 satisfied the Welsh Government which recommended legislative consent to the Bill. The Scottish Parliament refused consent but this bare fact does not reflect the extensive changes to the Bill.

Although it is possible under the European Union (Withdrawal) Act for UK ministers to make regulations and even common frameworks without consent, as a matter of political principle and of pragmatic practice this appears far more difficult.[51] As to principle, the EUWA contains procedures which aim to arrive at consent in the making of secondary legislation that encompasses devolved matters.[52] There is an over-ride power but this would be exercisable in the face of consent having been sought and explicitly refused. As a matter of pragmatics, Brexit does not fundamentally alter devolved competence. As a consequence, without agreement, common frameworks would be simply unworkable since the possibility exists of different and conflicting laws being passed across the UK, leading to the potentially interminable passage of

[50] See new s 30 A of the Scotland Act 1998, inserted by European Union (Withdrawal) Act 2018, s 12(2).

[51] In addition, any such regulations are subject to a sunset provision. European Union (Withdrawal) Act 2018, s 12(9).

[52] EUWA ss 12(2), 12(4) and 12(6).

contradictory, tit for tat laws (for example, see discussion below of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018). In other words, if the central state does not take seriously the associative dimension of post-Brexit government, the danger is that the UK's constituent territories will exercise their autonomy in a way that will deeply frustrate the Brexit project.

A further dimension of this new complex environment is legislation that now anticipates common frameworks and which is now embedding in law the need for cooperation across the UK. As the Institute for Government puts it:

> There is one important area of agreement: all sides recognise that, after Brexit, 'frameworks' or agreements between the four nations will be required in some of the policy areas where powers are returning from the EU. One of the key reasons these new agreements are necessary is to ensure the functioning of the 'UK internal market', by avoiding new barriers to doing business across the UK and unfair competition between businesses based in different parts of the UK. Frameworks will also be important enablers for the UK government as they pursue new international agreements and trade deals.[53]

This reality prompted the Institute for Government to observe: 'Brexit will require the UK and the devolved nations to co-operate actively in a way that has not always been necessary within the EU structures. The four nations should seize this chance to strengthen their relationship.'[54] The complementarity between autonomy and associative rule which we have argued is inherent in the federal idea seems to come to life within this new reality: the thickening and deepening of the matrix of territorial rule after Brexit.

A good example of what is likely to be an entirely new set of relations can be seen in the Fisheries Bill which awaits final passage through Parliament. Fisheries are generally a devolved matter; indeed there is a specific intergovernmental concordat on fisheries matters.[55] The Bill is designed to replace the UK's relationship to the Common Fisheries Policy with common frameworks or 'common approaches'[56] to the management of fisheries between the UK government and the Devolved Administrations through what are known as 'fisheries policy authorities'.[57] The aim is to create a new system to coordinate fisheries policies after the UK has left the EU. Crucially, the Bill provides that a Joint Fisheries Statement (JFS) 'may only be prepared by the fisheries policy authorities acting jointly.'[58] This is a far cry from the initial approach taken in the European Union (Withdrawal) Bill. The Fisheries Bill contains various other consultation requirements. It also contains wide secondary law making powers[59] to

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[53] MJ Jack, J Owen, A Paun and J Kellam, 'Devolution after Brexit: Managing the environment, agriculture and fisheries' (Institute for Government, 9 April 2018) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devoution-After-Brexit-180413-FINAL-WEB.pdf> accessed 16 July 2019, Summary.

[54] ibid.

[55] Concordat on Fisheries Management in the UK 2012 (updated 2016) <https://www2.gov.scot/Topics/marine/Sea-Fisheries/context/Concordat/2012concordat> accessed 16 July 2019.

[56] Fisheries Bill (2017-19) [305], 'Explanatory Notes', para 1.

[57] ibid cl 2(4).

[58] ibid cl 3(1).

[59] ibid cls 31 and 33.

change retained EU law in relation to current CFP competences, but again these can only be exercised with the consent of devolved ministers if they cover areas of devolved competence.[60]

This brings out another dimension of Brexit planning, namely that with so many powers returning from Brussels, the Brexit-related legislation is replete with delegated powers to change retained EU law, not only for the UK government but also for the devolved governments. We see this in the European Union (Withdrawal) Act s.11 as well as in other bills, including the Fisheries Bill and the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.[61] This legislation, in making provision for the devolved administrations to modify retained EU law, gives them the potential to make significant policy choices in a number of areas of returning competence. There are attempts to circumscribe this power in the legislation but the upshot of Brexit would be a considerable extension of the areas of competence of devolved governments as well as delegated law-making powers to adapt these competences to domestic law. Already we have seen the Scottish Parliament legislate in anticipation of these powers, passing the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018. This Bill asserts that the Scottish Government has powers to prepare for Brexit analogous to those given to the UK Government by the EUWA. The UK Supreme Court found much of the Bill to be beyond the competence of the Scottish Parliament and hence unlawful but, importantly, not the principle of its passage.[62] This episode highlights that with Brexit will come enhanced autonomy for the devolved administrations in very important areas of policy, including in areas where the demarcation of competence between centre and devolved administrations is far from clear. The 'Continuity Bill' exposes both the capacity and the will of the Scottish devolved institutions to try to do Brexit 'their way': the potential headache this could pose to the UK Government in trying to coordinate a unified approach to repatriation of competences is very clear. Since there are so many areas of possible overlap, these parallel powers can only work through detailed cooperation at official as well as political level. Again we see how the imbalance between the autonomy and associative government dimensions of devolution is potentially problematic.

A third point is that Brexit of course anticipates new international agreements. While the UK Government will have relative autonomy in the drafting, agreement and ratification of these, it is a very different matter when it comes to implementation should these agreements, as in areas such as fisheries or agriculture, involve devolved matters. Other countries with multi-level systems of government, such as Canada, have recognised the risk of variable levels of implementation, and have in place processes designed to build coordination through consensus;[63] the UK will surely need such a system. When new agreements concern devolved matters such as fisheries there will be extensive discretion on the part of devolved legislatures on how best to implement these. And since the Fisheries Bill requires consent in drawing up new common frameworks, the devolved territories' policy positions will have legal as well as

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[60] ibid cl 35.

[61] ibid cl 37 and schedule 6; Immigration and Social Security Co-ordination (EU Withdrawal) Bill (2017-19) [309] cl 5 and schedule 2.

[62] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64.

[63] F Morrissette, 'Provincial Involvement in International Treaty Making: The European Union as a Possible Model' (2012) 37 Queen's Law Journal 577. For discussion, see also House of Lords Constitution Committee, *Parliamentary scrutiny of treaties* (HL 2017–19, 345) (hereafter 'Parliamentary scrutiny of treaties Report'), para 135.

political weight. There are strong signs that the Government is alive to the new political realities of heavily over-lapping competences in relation to international treaty-making.[64]

Therefore, in light the most recent Brexit- related legislation, it seems that we should perhaps see *Miller* and the first draft of the European Union (Withdrawal) Bill as the start and certainly not the end of the Brexit story in relation to devolved authority and the need for deeply entwined associative government which it inevitably presages. In fact, the political backlash from these two developments seems to have alerted the Government to the need for a more federal mentality in relation to consent, particularly in light of the nationalist pressures from Scotland. Devolved consent will most likely continue to be refused for Brexit bills by the Scottish Parliament[65] but this appears to have become as much a point of anti-Brexit principle as a fear of encroachment on devolved competence. The legislation now emerging is alive to the fact that with such extensive overlap between returning EU competences and devolved powers, common frameworks can only be drafted and managed by way of consent. Furthermore, the new international agreements in so many of these areas can also only be successfully implemented across the UK in a consistent way through consent.

C. *Strengthening Associative Government*

These factors are not however the whole story. There are several areas in which institutions are still to catch up with competences and where a union or federal mentality needs to infuse this development. We will mention a few of these briefly. One is intergovernmental relations (IGR), which operates principally through the Joint Ministerial Committee (JMC), a structure often criticised for its lack of formalisation and tendency to be side-lined by the central government.[66] But interaction between the UK and devolved governments has already been widening and deepening in light of the new competences devolved through the Scotland Acts 2012 and 2016, and the Wales Act 2017.

Scotland in particular stands out for the very broad expansion in devolution brought about by the Scotland Act 2016.[67] These new powers are in many cases shared with the UK Government. For example, the Act devolves extensive tax-varying powers (building on those already contained in the 2012 Act), and these powers now require close cooperation with the Treasury, as do concurrent powers to create new benefits and to roll out Universal Credit. Indeed the implementation of new welfare policies and the management of them also require

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[64] See for example evidence given by David Lidington, Chancellor to the Duchy of Lancaster, to the Constitution Committee inquiry into parliamentary scrutiny of treaties: 'Parliamentary scrutiny of treaties report' (n 63) paras 145 and 147.

[65] Recent examples of Bills which have not received the legislative consent of the Scottish Parliament include the Trade Bill (2017-19) [364], the Agriculture Bill (2017-19) [266] (as introduced), [292] (as amended), and the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (n 61).

[66] 'Inter-governmental Relations in the United Kingdom Report' (n 8) paras 50, 61-2, 70-2, 76 and 86. See this report also for a thorough description and analysis of how the system currently operates.

[67] The Constitution Committee summarised the new powers thus: 'The Scottish Parliament acquires control of its own composition and electoral system. The Bill devolves significant tax powers, particularly in relation to the rates and bands of income tax, and allocates a significant share of VAT receipts to the Scottish Government. Powers in relation to welfare benefits are devolved for the first time… The Scottish Parliament and Government acquire new powers in policy areas such as employment, transport, energy efficiency, fuel poverty, and onshore oil and gas extraction, and authority in relation to a range of public bodies, hitherto reserved. They will also have competence over the Crown Estate, equal opportunities and abortion policy, plus many other public functions; while almost all Tribunals will be devolved.' 'Scotland Bill Report' (n 8) para 8.

close cooperation between Edinburgh and London. Other examples of associative government produced by the 2016 Act are duties of consultation on renewable electricity incentive schemes; requirements for consent on electoral registration; the need for information-sharing on roads policy and welfare provisions; the sharing of proceeds from onshore petroleum; and provisions in relation to management of cross-border bodies on equal opportunities and the British Transport Police. The House of Lords Constitution Committee, noted the high degree of overlap in powers which the Scotland Act 2016 would bring: 'the hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament will become considerably less clear.'[68]

The reality of overlapping powers from the 2016 Act (and analogous developments in the Wales Act 2017) are therefore already demanding a far more involved level of executive intergovernmental relations than previously existed, at least at the level of officials, even though political relations remain tense. We see the emergence of this in civil service training and in the far more extensive engagement between the central administration and devolved administrations in the everyday management of the state.[69] Much of this is below the political radar, but it is real.

In light of Brexit, further steps will be needed, including adjustment of the terms of reference of the JMC. This is required to accommodate three major developments associated with withdrawal from the EU: one is the new common frameworks; a second is the new regulatory bodies that will be needed to manage these across devolved and reserved areas; and a third is the drawing up, ratification and implementation of new international agreements.[70] It may well be that the JMC will need a new sub-committee or committees to cover these complex and voluminous areas of practice.[71]

More generally, a set of firmer, practical commitments to getting the necessary JMC business done will be essential, including a firmer timetable for meetings - both bilateral and plenary - and a set of plans for drawing up agendas consensually. Some, including the Institute for Government, have argued that a set of guiding principles may help create trust, but of more pressing significance would seem to be practical plans for more meetings and for the continued redirection of civil service resources to get the work done.

Another necessary change will be one of mind-set, and the diversion by Whitehall of significant resources to the day to day running of the new system, to deal with technical matters, and allowing executive level IGR meetings and other interactions to address serious policy issues. But again there is evidence that this is happening, as planning for new common frameworks in light of the shared powers in the European Union (Withdrawal) Act and other Brexit-related bills bring the devolution angle to the fore.

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[68] 'Proposals for the Devolution of Further Powers to Scotland Report' (n 8) para 20.

[69] 'Inter-governmental relations in the United Kingdom Report' (n 8) paras 164-71,

[70] For a thorough review of existing scrutiny processes and mechanisms and recommendations for how these might be improved see 'Parliamentary scrutiny of treaties Report'(n 63).

[71] Recommendations in this direction were made in the 'Inter-governmental relations in the United Kingdom Report' (n 8) paras 70-72, See also the Institute for Government, 'Devolution after Brexit' (n 53), Summary: 'The UK's increased ability to strike international agreements after Brexit will require new consultation mechanisms to ensure the views of the devolved administrations can be heard.'

What about overall management? The Bingham Centre has suggested that the UK needs to develop a Department for the Union to replace the separate territorial departments, Scotland Office, Wales Office etc.[72] This may make sense, provided it does not become an antagonist in the game and start to exercise a form of hegemony. Canada has an equivalent in the Privy Council Office, and it is not always seen as an honest broker by the provinces. One advantage of the separate offices is that they help facilitate the bilateral as well as plural inter-governmental relations which are part of our asymmetrical system. As has been argued, associative government can play out in different ways, but it is essential that institutions are designed to foster cooperative rather than inimical association.

Intergovernmental discussions inevitably focus mainly upon the executive level, but associative government should also be fostered within the legislative branch. When we turn to this level the focus in federal discussions tends to be upon the existence and role of second chambers; indeed, within narrow institutionalist approaches we frequently find insistence that a territorialised second chamber is essential to federal government. Again this is a consequence of a very detailed institutionalist mind-set. In the UK there has been no serious attempt to rework the House of Lords as a second chamber to reflect the idea of the UK as a territorial state,[73] and in any case the size of England makes most proposals to do so infeasible.[74] But it is possible for a second chamber, however it is constituted, to take a particular interest in territorial politics, and to act, if not as a voice, at least as a watchdog for the constitutional rights of the regions as well as for the health of the union as a whole. The number of inquiries on devolution undertaken by the Constitution Committee in recent years suggests that such an informal role may well be developing.[75] It is also notable that Lords' committees played an instrumental hand in helping to guide the Government towards a radical revision of what became s.12 of the European Union (Withdrawal) Act, and that the Constitution Committee's reports take very seriously the implications of any public bills for devolution,[76] including Brexit-related bills.[77]

Another way to help foster a federal balance is by legislatures across the UK working together in scrutinising IGR, and in so doing helping to build the solidarity of associative government among elected politicians who find common cause in facing down executive power. Brexit offers a unique opportunity for, and arguably demands, such cooperation. In light of the volume of Brexit legislation and the number of international agreements that will be needed, it is clear that close cooperation by governments in using ss 11 and 12 will be required. It is equally imperative that the legislatures find ways to cooperate, perhaps dividing up issues to address and sharing reports, or even moving to working together on inquiries, including joint evidence sessions. Even if, in political terms, this is difficult to achieve at first there are more modest ways to work together, such as the sequencing of reports. This has worked recently in relation to the Lords and Commons where Lords committees have reported ahead of Commons

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[72] Bingham Centre, 'A Constitutional Crossroads' (n 19) 11.

[73] House of Lords Act 1999.

[74] Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (Cmnd 5460, 1973) (hereafter 'Kilbrandon Report') paras 531 and 534.

[75] See n 8 above.

[76] For example, House of Lords Constitution Committee, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (HL 2017–19, 211).

[77] House of Lords Constitution Committee, *European Union (Withdrawal) Bill* (HL 2017–19, 69).

debates knowing the Commons is in a better place to control the government.[78] The devolved legislatures could start to do more of the same in relation to Westminster committees, and vice versa.

5. *Conclusions*

When we consider federalism as an idea rather than a particular institutional form, addressing it through the register of constitutional theory, what we find is that balance or equilibrium is central to achieving federalism's essential constitutional purpose: the accommodation of territorial pluralism. Autonomy and union (or associative government) are often posited as antagonistic goals within federal thought,[79] but in fact they are essentially complementary. Self-government can only be fulfilled if autonomous territories have a say in governing through the central organs of the state; and this process of associating in the practice of government makes the state more secure by emphasising its relevance to sub-state territories.

Another feature of federalism as an essentially constitutional idea is that the way in which this balance is reached must be worked out institutionally from state to state. There is no institutional suit to be lifted from the shelf of constitutional options which can be called 'federalism'. As we look to the number of fraught constitutional situations around the globe in recent decades, from South Africa to Bosnia-Herzegovina to Iraq, where federalism has been called upon in radically different ways as a constitutional model thought capable of offering both the institutional structure and symbolism of union without unity, we see that the very concept of federalism as a constitutional idea is broad and open to a wide range of governmental instantiations in response to the particularity of territorial pluralism in each polity.

This reality is surely encouraging for the UK, with its deep asymmetry and the huge imbalance in terms of size among its component territories, its uncodified constitution, the absence of a territorial legislative chamber and the limited role it accords to judicial review; all of which are treated from certain institutionally-focussed perspectives of federalism to be pathological failings. It is therefore the case that each state that is characterised by territorial pluralism must find its own balance between autonomy and union. And as other states have discovered, it is often when the territorial constitution is seemingly most threatened that states through necessity find suitable remedies for existing deficiencies.

The UK constitution is living through a time of great uncertainty as well as upheaval, but what the Brexit process has exposed is that territorially segmented powers in the UK no longer operate in silos as they appeared to do during the first fifteen years of devolution. A broader claim made in this article is that the relationship between the two dimensions of federal rule are better viewed as a matrix, hosting many avenues of over-lapping interaction, rather than through the language of separate or divided levels of rule. In a world of ever more pervasive government that spans external as well as internal state relationships, the interplay between governments within a territorial union become ever more difficult to disentangle. The

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[78] M Elliott and S Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 29, 31.

[79] MM Feeley and E Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2011).

United Kingdom, far from being an exception to this truth, is an archetypal case in point. We see this as powers are set to return from Brussels into an environment of deep intergovernmental engagement brought about by the Scotland Act 2016 and Wales Act 2017. The management of these powers will require the deep involvement of the devolved administrations in both the preparation of new common approaches to shared competence and the building of new UK external relations both with and beyond the European Union.[80]

This new matrix of associative government also demands a significant change in mentality, to foster institutions of interaction at legislative as well as executive level best suited to manage the new reality. If one of the lessons of Brexit is that it is very hard to create a clean break in relation to an entity with which you have built up extensive and interwoven patterns of government, then the domestic lesson too must be that the process of returning these powers to an already territorially-segmented UK will inevitably also lead to deep and extensive processes of sharing, cooperation and agreement.

Dicey viewed federalism (as did Carl Schmitt four decades later) as a pathology that would either disappear in the face of centripetal pressures or lead to the dissolution of those states which adopted it. The last century has exposed this to be empirically false as federal states have proliferated and constitute many of the most durable and stable democracies in the world today. The UK does not bear the name federal, nor does it need to. But it is the case that federalism is a useful prism through which to assess if the UK is capable of achieving a successful balance between its territorial diversity on the one hand and the efficacy of union which is the essential complement of pluralism on the other. We don't know where the UK's fraught attempts to leave the European Union will lead, but, if nothing else, the political realities of the past two years may have begun to move the UK, perhaps grudgingly and certainly not smoothly, towards a greater understanding of what it means in practice to live out constitutionally the abstract idea of union.

[80] Northern Ireland remains a deeply problematic situation in relation to Brexit. It has not featured prominently in this article because the ongoing suspension of the devolved institutions throughout the Brexit process has meant that, although the Democratic Unionist Party holds the balance of power in the House of Commons, the devolved voice in Belfast is currently absent from these vital deliberations. The unique constitutional status of Northern Ireland, recognised in the Northern Ireland Act 1998, and the particular way in which the province is affected by the Brexit process, makes the continued abeyance of devolution all the more troubling. Northern Ireland should have a significant and discrete role to play in the repatriation of competences after Brexit, but for the foreseeable future the legal process for Northern Ireland will be given effect through what is essentially direct rule from London.